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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT NOEL MISTLER, Defendant and Appellant.	C062054 (Super. Ct. No. CRF046307)

Defendant was charged with sexual assault on two unconscious or intoxicated women; at trial, evidence of his forcible rape of a third was admitted under Evidence Code section 1108 to show propensity. The jury convicted defendant of rape of an unconscious person (Pen. Code, § 261, subd. (a)(4)) and burglary (Pen. Code, § 459), as to one victim, and acquitted him of all charges as to the other victim. After the verdict, defendant hired a new attorney and moved for a new

trial. That motion was denied and defendant was sentenced to the upper term of eight years in prison.[1]

On appeal, defendant contends the trial court erred in denying his motion for a new trial based on erroneous evidentiary rulings, including the admission of the propensity evidence, prosecutorial misconduct in repeatedly asking defendant and a defense witness if prosecution witnesses were lying, ineffective assistance of counsel in juror selection, and in failing to investigate and present exculpatory evidence. He also contends the court erred in denying an evidentiary hearing on the new trial motion. We affirm.

FACTS

The J.M. Incident

In 2004, defendant was charged with and convicted of raping J.M. while she was unconscious. The People introduced evidence of prior sexual activity between J.M. and defendant. (See Evid. Code, § 1103, subd. (c)(3).)

J.M. had known defendant since she was 12 or 13 years old. When she was 17, she was walking home with defendant and they kissed. Defendant removed her shorts without her objection. Defendant asked her for sex, but she said no. He continued to ask and J.M. said no three to five times. Then defendant

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[1] Because defendant was convicted of an offense that requires him to register as a sex offender (Pen. Code, § 290, subd. (c)), he is not entitled to additional presentence custody credit under recent amendments to Penal Code section 4019. (Pen. Code, § 4019, subd. (b)(2).)

stopped asking and forced his penis into her vagina. A car drove by and defendant stopped. J.M. was a virgin and scared; defendant told her not to tell anyone. They continued to walk down the street and defendant bent her over a fence and penetrated her again.

J.M. was upset with herself. She was confused and thought that if she agreed to sex and had control over the situation, she might feel better. A week later she invited defendant over to her house while her parents were gone. She and defendant had consensual sex. J.M. did not feel better afterwards; instead, she threw up after defendant left.

J.M. saw defendant occasionally during the next few years while they were in college. She did not like him. She told her friend Danielle, as well as a boyfriend, about what happened with defendant.

In 2004, J.M. came back to West Sacramento. In October 2004, J.M. and a group of friends took a friend out to bars to celebrate his 21st birthday. After the bars closed, they returned to J.M.'s house.

After the group left the bars, defendant called and asked if he could come over to J.M.'s. Defendant came over with Ashley Draper and later took her home. Defendant returned to J.M.'s alone.

J.M. went to bed at 4:30 in the morning while several of her friends were still there. When she woke up, defendant was on top of her, penetrating her. She recognized him when he spoke to her. J.M. began crying and asked, "why?" Defendant

said, “Please stop crying. People are going to think I raped you. I’m sorry. I’m sorry.” Then he left. J.M. called for her friends, but they did not hear her so she put on her pajama bottoms and went to the living room. She curled up in a friend’s lap and cried. J.M. said, “Bet,” which is defendant’s nickname.

Two friends, Joe Almaraz and A.J. Meza, convinced J.M. to return to her room and calmed her down enough that she could tell them what had happened. Almaraz went outside to find defendant. Defendant said, “What’s going on, dude. I didn’t fucking touch her. I didn’t rape her.” Almaraz and Ronald Ridenour told defendant to leave. Ridenour drove defendant away; defendant told him he had had sex with J.M. Defendant said J.M. was “cool with it,” but then changed her mind. Ridenour thought defendant looked scared; like he did something wrong and got caught.

J.M.’s roommate got home from work shortly after 6:00 a.m. and found J.M. crying with Almaraz and Meza. J.M. said, “It happened again. He did it again. He raped me.” The roommate called the police.

Afterwards, J.M. was unable to sleep alone for months. She eventually moved back in with her parents.

Sexual Assault Exam and Forensic Evidence

J.M. had a four-hour sexual assault exam at UC Davis Medical Center. J.M. identified defendant as her assailant. A vaginal slide showed nonmotile sperm and spermatozoa. J.M. had a faint abrasion on her abdomen and one-centimeter tears of her

fossa naviculars and posterior fourchette. These rare injuries were consistent with sexual assault and rarely seen in nonassault exams.

No drugs were present in J.M.'s urine. At 9:55 a.m. her blood-alcohol concentration was .15 percent. A forensic alcohol analyst calculated it would have been .24 to .25 percent between 4:00 a.m. and 5:00 a.m. The DNA profile on J.M.'s vaginal swab and her underwear matched defendant's profile. The crotch area of J.M.'s underwear was also positive for amylase, an enzyme found in high concentrations in saliva.

The G.B. Incident

The jury acquitted defendant of sexual penetration of an intoxicated person and sexual battery on G.B. In mid-October 2003, G.B. went with her cousin to a friend's house and defendant was there. Later she blacked out in the bathroom. She was drunk; her blood-alcohol concentration was about .24 percent. Her cousin found G.B. in the bathroom crying and in shock; a White boy (not defendant) was with her. She had pain in her private parts and thought she had been sexually assaulted. G.B. claimed defendant kissed her neck and touched her crotch and breast over her clothes that night. The DNA profile on a neck swab from G.B. matched defendant's profile.

Evidence Code section 1108 Evidence

Before trial, the defense moved to exclude evidence of uncharged acts, contending the evidence was inflammatory and time consuming, and the source was not reliable. The People moved to admit evidence of defendant's alleged rape of a third

female, A.B., under Evidence Code section 1108. In a lengthy response, the defense objected, arguing the evidence was too dissimilar to the charged offenses; it was violent and inflammatory. The defense also argued A.B. was a biased witness and the evidence would be too time consuming. The trial court granted the People's motion to admit the evidence. The court noted that the evidence could hurt the People since no charges were filed.

A.B. testified she dated defendant for about six weeks, beginning in May 2004. She tried to end it because defendant was violent towards her and had a lot of drug use, but he returned many times. On October 4, 2004, defendant banged on A.B.'s door and pushed it open. She did not call the police because she was afraid of his friends. Defendant was sweating, as he often did when using cocaine. He drank a beer at the kitchen table. He tried to pull A.B. towards the bedroom. She put her hand on the wall to brace herself, but fell. Defendant forced her pants off, put on a condom and penetrated her. A.B. said, "No. Don't. Stop." When he left, defendant told A.B. she meant to say, "No, don't stop." He told her, "If I say it didn't happen, it didn't happen."

A.B. did not report the incident as she was afraid and ashamed. Nine days later she got a restraining order against defendant, but did not mention the rape. She later went to the West Sacramento police who took her to the Sacramento police, where the alleged rape occurred, but no case was filed.

A.B. told her sister about the rape. Her sister recalled A.B. told her defendant grabbed her by the hair and pulled her off the couch. He led her to the bedroom where he raped her. They did not discuss it again.

A.B.'s story was impeached over inconsistencies as to when she reported the alleged rape to the police and an investigation into withdrawals from her checking account. A.B.'s parents put money into her account for her education. Her mother opened the bank statement by mistake and noticed the balance was wrong. She confronted A.B., who cried and said defendant took the money and he did not treat her nice. A.B. and her mother went to the police on October 7, 2004; A.B. told the police she rarely used the account and did not check the balance. A.B. said only defendant could have taken the money. She did not mention being forced to make withdrawals. The police told her to fill out an affidavit of forgery at the bank. The missing money totaled $9,266.54.

However, a police investigation of video tapes of ATM machines showed that A.B. had made most of the withdrawals. A.B. then claimed she was forced by defendant to make withdrawals. The police refused to proceed with the case.

A.B. claimed she told the police on October 7 that she was raped. The officer taking the report testified A.B. did not report a rape. At the follow-up meeting with police a week later, A.B. did report the rape and the officer took her to Sacramento, which had jurisdiction. The rape case was dropped for insufficient evidence.

Defendant also provided an alibi to A.B.'s charge of rape. Defendant's mother, aunt, and a handyman testified defendant worked all day October 4 at a rental property owned by the aunt.

Ashley Draper, who was engaged to defendant and pregnant with his child, testified A.B. used to follow her in her car around the apartment complex. Once at a birthday party A.B. drove up the street, did a donut, and peeled out. Another time, A.B. trailed her onto the interstate. When Draper pulled into a Denny's, A.B. followed and pulled Draper out of her car and began hitting her. A security guard broke it up.

Defendant's Testimony

Defendant gave a completely different version of events with J.M. He claimed the sex they had when J.M. was 17 was entirely consensual. In October 2004, he and Draper were just friends. They went to J.M.'s the night of October 1 and played poker and joked around. Draper wanted to leave, and J.M. told defendant he should come back. He did and knocked on her door. She told him to come in and they talked for awhile. He lay down on the bed and they cuddled and kissed. He performed oral sex on J.M. and she moaned. Then they had intercourse. Afterwards J.M. was unhappy and said, "we shouldn't have done that." Defendant asked what was wrong, but got no answer so he left. Outside, Almaraz told him J.M. wanted him to leave.

Defendant denied he touched G.B. He testified G.B. gave him a hug and tried to kiss him. She was drunk and smelled like vomit so he kissed only her neck.

On cross-examination, the prosecutor asked defendant about the different version of events testified to by other witnesses. He asked defendant repeatedly, "are they lying?"

Motion for a New Trial

After the verdict, defendant hired a new attorney. The trial judge, Judge Johnson, noted that whenever things did not go defendant's way, he hired a new attorney.[2] Defendant moved to disqualify Judge Johnson under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), on the basis that a person aware of the facts might reasonably entertain doubt that the judge would be impartial. The motion was granted.

Defendant moved for a new trial. In setting the briefing schedule, the court, Judge Rosenberg, noted, "[i]t's expected to be an evidentiary hearing with one or more witnesses." Later, in denying a motion to compel transport of a prisoner witness, the court indicated it had not determined whether to allow an evidentiary hearing. At the hearing on the motion, defense counsel objected to the lack of an evidentiary hearing. The

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[2] Judge Johnson also denied a motion for a continuance to allow defendant to obtain trial transcripts. This ruling was vacated after defendant filed a writ and this court indicated its intention to issue a peremptory writ of mandate.

The case was continued several times before trial. Defendant's first attorney, John Virga, asked for a continuance once due to scheduled hip surgery; he later withdrew due to health problems. The appointed public defender withdrew due to a conflict. Robert Spangler was appointed and later replaced by retained counsel, Gary Talesfore. The People were granted long continuances to bring in new prosecutors and for DNA testing.

court subsequently issued a written ruling, denying the motion for a new trial and the request for an evidentiary hearing.

Defendant moved for reconsideration, arguing he relied upon the court's representation that there would be an evidentiary hearing and so did not file certain affidavits. The court stated it intended to grant the motion for reconsideration and would consider certain declarations.

Thereafter, the court again issued a written ruling denying the motion for a new trial. The court found an evidentiary hearing would not be helpful or necessary.

DISCUSSION

I.

There Was No Abuse of Discretion in Denying the Motion for a New Trial

A. Standard of Review

Penal Code section 1181 sets forth the grounds for a new trial following a verdict against the defendant. As relevant here, a court may grant a new trial in a criminal case "[w]hen the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury." (Pen. Code, § 1181, subd. 5.) Although not a statutory ground, ineffective assistance of counsel may be asserted as the basis for a new trial. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583; *People v. Reed* (2010) 183 Cal.App.4th 1137, 1143.)

We review the denial of a new trial motion without an evidentiary hearing for abuse of discretion. (*Bardessono v. Michels* (1970) 3 Cal.3d 780, 795; *People v. Duran* (1996) 50 Cal.App.4th 103, 113.) The latitude accorded the trial court in these matters is extraordinarily broad. "'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.' [Citations.]" (*People v. Williams* (1988) 45 Cal.3d 1268, 1318.) And the decision whether to hear evidence before ruling on a new trial motion is discretionary. An evidentiary hearing "'should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 635, 686.)

B. The Trial Court Did Not Deny Defendant a Fair Trial

Defendant contends errors by the trial court denied him a fair trial and the court abused its discretion by denying his motion for a new trial on this basis. Defendant contends the trial court erred in admitting the propensity evidence under Evidence Code section 1108 and failed to protect his right to a fair trial by permitting the prosecutor to elicit prejudicial hearsay. We consider each contention in turn.

1. Evidence Code section 1108 Evidence

Defendant contends the trial court erred in admitting evidence that he raped A.B. because such evidence was completely false. There was insufficient evidence the rape occurred and

thus the evidence did not meet the foundational requirement for admission. Defendant contends the evidence was highly prejudicial and inflammatory, painting him as a violent rapist. Finally, he asserts the evidence was unduly time consuming as its presentation and rebuttal took about as much time as the charged offenses combined.

Evidence Code section 1108 creates an exception to Evidence Code section 1101's prohibition against propensity evidence for sexual offense cases. (*People v. Escudero* (2010) 183 Cal.App.4th 302, 309-310.) Under Evidence Code section 1108, when a criminal defendant is accused of a sexual offense, "evidence of the defendant's commission of another sexual offense or offenses" is not excluded under section 1101 if not inadmissible under Evidence Code section 352. (Evid. Code, § 1108, subd. (a).)

Evidence Code section 352 gives a court the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court's ruling under Evidence Code section 352 is reviewed for abuse of discretion and will "'not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Under Evidence Code section 352, a trial court must engage in a careful weighing process before admitting propensity evidence. "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 921.)

Defendant contends that as to the alleged rape of A.B., "the degree of certainty of its commission" was too low to support its admission as evidence. He argues this other crimes evidence failed the "obvious" foundational requirement that he committed the crime. (*People v. Carpenter* (1997) 15 Cal.4th 312, 383, superseded by statute as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) Defendant points to the evidence that impeached A.B.'s testimony, particularly the testimony of two police officers concerning the investigation into improper withdrawals from her account, as well as defendant's alibi evidence.

In ruling on the motion for a new trial, the court noted A.B.'s claim of rape "lacked credibility" as it was arguable she made it up to deflect blame from her actions in withdrawing money from the bank account. At the time of the ruling to admit the evidence, however, the evidence concerning the bank investigation was not before the court. Instead, the court had evidence that A.B. would testify to the rape and her testimony would be corroborated by her sister, while defendant would present an alibi. This state of the evidence, though conflicting, was sufficient to provide the necessary foundation for admission.

Defendant contends the A.B. evidence was inflammatory and unduly prejudicial because it involved violence and drug use. Apparently the Legislature disagrees that forcible rape is a considerably more serious crime than either rape of an unconscious person or sexual penetration where the person is prevented from resisting by intoxication because the penalties for all three crimes are the same. (Pen. Code, §§ 264, subd. (a); 289, subd. (e).) This is not a case where the uncharged sexual offense was far more egregious in scope and impact than the charged offenses. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741 [court abused its discretion when it admitted evidence of a prior 20-year-old violent crime involving forcible sexual mutilation in sex offense case involving molestation of mental patients].) Further, all three alleged crimes involved attacks upon women known to defendant in circumstances where the assailant took advantage of the victims'

vulnerabilities. The similarities of the three incidents made the A.B. incident probative on the issue of propensity and there was no issue of remoteness. The A.B. incident took place days after the rape of J.M. and about a year after the G.B. incident. Evidence Code section 1108 "does not limit evidence of uncharged sexual offenses to those committed prior to the charged offense." (*People v. Medina* (2003) 114 Cal.App.4th 897, 902.)

Perhaps the strongest basis for excluding the A.B. evidence was that it was time consuming and distracted the jury from consideration of the charged offenses. While the defense argued the A.B. evidence would "increase the time on this thing tremendously," the defense did not mention or explain to the court the full extent of the impeaching evidence and the side issue of the bank account investigation. Given the information before the trial court when it ruled on admissibility, we cannot say the court abused its discretion in admitting the evidence or that it was an abuse of discretion to deny the motion for a new trial on this basis.

2. Eliciting Prejudicial Hearsay

Defendant contends the trial court failed to protect his right to a fair trial by permitting the prosecutor, on numerous occasions, to elicit prejudicial hearsay. He also raises this contention under the rubric of prosecutorial misconduct and ineffective assistance of counsel. In his opening brief, defendant does not set forth the alleged prejudicial hearsay. Instead, he merely cites to portions of the motion for a new

trial where he raised this point. As the Attorney General points out, this is improper appellate practice.[3]

It is improper for an appellant to incorporate legal arguments from papers filed in the trial court into the opening brief on appeal. Appellants must argue their cases to this court, not merely recycle their trial arguments; we will not search the record to ascertain their appellate arguments. Such incorporation by reference of briefs or points and authorities filed in the trial court is an improper mode of appellate

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[3] Defendant belatedly sets forth the specific testimony he claims was prejudicial hearsay in his reply brief. "The general rule is that points raised for the first time in a reply brief will not be considered unless good cause is shown for the failure to present them before." (*Trustees of Capital Wholesale Electric etc. Fund v. Shearson Lehman Brothers, Inc.* (1990) 221 Cal.App.3d 617, 627.) Defendant offers no explanation for failing to set forth this argument in full in his opening brief. Instead, he defends his improper incorporation by reference and sets forth the argument in full only "[i]n an abundance of caution."

From the separate testimony he cites, we observe that defendant appears not to understand the hearsay rule; he uses the term "hearsay" as shorthand for objectionable evidence. "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Much of the evidence to which defendant objects, particularly the testimony of Almaraz and Ridenour about what they saw and believed happened that night, constitutes statements by witnesses at trial about their observations and opinions. While there may be a proper objection to some of this evidence, it is not hearsay; the statement is not by an out-of-court declarant. We decline to make defendant's arguments for him.

advocacy and warrants a determination that the argument has been abandoned. (See *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720-721.) An attempt to incorporate by reference arguments made in the trial court papers is impermissible; all arguments must be fully set forth in the appellate briefs. (*Garrick Development Co. v. Hayward Unified School Dist*. (1992) 3 Cal.App.4th 320, 334.) Due to defendant's failure to properly present this argument in his opening brief, we deem it abandoned.

C. By Failing to Object, Defendant Forfeited the Claim that the Prosecutor's "Were They Lying" Questions were Prosecutorial Misconduct

"Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.) "Prosecutorial misconduct is reversible under the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1124, disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.]" (*People v. Guerra, supra,* at p. 1124.)

To preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition, "unless an admonition would not have cured the harm." (*People v. Davis* (2009) 46 Cal.4th 539, 612; see *People v. Kipp* (2001) 26 Cal.4th 1100, 1130.)

1. Background--The "Were They Lying" Questions

Draper testified she and defendant were just friends, not in a dating relationship, in October 2004. On cross-examination, the prosecutor asked her if she knew any reason why Almaraz would say they were boyfriend and girlfriend. When she responded she did not know a reason, the prosecutor asked if Almaraz was lying. Without objection from the defense, the prosecutor continued to ask if other witnesses who said the same were lying. Draper was also asked if A.B. was lying when she said Draper beat her up.

On cross-examination, the prosecutor asked defendant repeatedly if other witnesses were lying about (1) he and Draper being boyfriend and girlfriend; (2) whether he was violent with A.B.; (3) whether he drove after the incident with J.M.; (4) whether J.M. invited him back to her house; (5) whether he tried to get J.M.'s phone number earlier that day; (6) whether he touched G.B.; and (7) whether he raped A.B. The only defense objection was when the prosecutor commented, "So it sounds like a lot of people here that have testified on the People's case

are lying. Is that what you're saying?" The court sustained defense's argumentative objection.[4]

2. Analysis

Defendant contends the prosecutor committed misconduct by repeatedly asking Draper and defendant whether other witnesses who testified to a different version of events were lying. Defendant contends these questions sought inadmissible and irrelevant lay opinion as to another's veracity and they were badgering, harassing and argumentative.

The Attorney General responds that defendant has forfeited this contention by failing to object to the "were they lying" questions and to request an admonition. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336 [failure to object and request admonition forfeits appellate claims of prosecutorial misconduct].) Defendant responds that an objection would have been futile because the one time he objected as argumentative, and the trial court sustained the objection, the prosecutor continued to ask the "were they lying" questions.

We agree defendant has forfeited this contention by failing to object. He has not shown an objection would have been futile. His only objection was to the prosecutor's argumentative remark about a lot of people lying; defendant did

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[4] "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.)

not object specifically to a question that asked if a particular witness was lying.

Moreover, defendant has failed to show the questions were improper. In *People v. Chatman, supra*, 38 Cal.4th 344, our Supreme Court considered the propriety of "were they lying" questions. It concluded "courts should carefully scrutinize 'were they lying' questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*Id*. at p. 384.)

The court reasoned, "A defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken. When, as here, the defendant knows the other witnesses well, he might know of reasons those witnesses might lie. Any of this testimony could be relevant to the credibility of both the defendant and the other witnesses. There is no reason to categorically exclude all such questions. Were a defendant to testify on direct examination that a witness against him lied, and go on to give reasons for this deception, surely that

testimony would not be excluded merely because credibility determinations fall squarely within the jury's province. Similarly, cross-examination along this line should not be categorically prohibited." (*People v. Chatman, supra,* 38 Cal.4th at p. 382.)

Here the prosecutor's questions were only as to events to which Draper or defendant were percipient witnesses. Further, Draper and defendant knew the witnesses who testified contrary to their testimony and thus could have provided insight as to why these witnesses might lie or otherwise give different testimony. Defendant took the stand in his defense and implicitly urged that the prosecution witnesses should not be believed. It was permissible for the prosecutor to clarify defendant's position that the prosecution witnesses were untruthful. (*People v. Chatman, supra,* 38 Cal.4th at p. 383.)

D. Defendant Has Failed to Show Ineffective Assistance of Counsel

Defendant's trial counsel took over the case about three weeks prior to trial. Defendant contends counsel was unprepared and rendered ineffective assistance. Specifically, defendant challenges counsel's juror selection, his failure to investigate, and his failure to present exculpatory evidence.

A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and resulted in prejudice. An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness

under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 693-694]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218.) The same standard applies to retained and appointed counsel. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 344-345 [64 L.Ed.2d 333, 344.)

1. Juror Selection

Defendant contends counsel should have challenged for cause, or at least removed by the exercise of a peremptory challenge, two jurors who had some experience with sexual assault. The first was the trial judge's former pastor, who disclosed on voir dire that his daughter had been raped six years earlier. He was glad his daughter's case settled as he believed a trial would have been very difficult for her. The juror believed he could keep an open mind and would not have too much empathy or sympathy to be fair. He indicated that just because there were allegations, he did not think it probably happened.

The second juror was on the board of a nonprofit organization that worked with sexual assault and domestic violence; in this capacity she worked with the prosecutor. She did not believe she would feel more empathy for the alleged victims and claimed there would be no problem in her working relationship with the district attorney's office if a not guilty verdict was returned.

Nothing in the record supports removing either juror for cause. There is no indication of general disqualification, or

actual or implied bias. (Code Civ. Proc., § 225, subd. (b)(1).) Counsel is not ineffective for failing to challenge a juror for cause without basis. "Counsel is not required to make futile objections or motions merely to create a record impregnable to assault for claimed inadequacy of counsel. [Citation.]" (*People v. Weston* (1981) 114 Cal.App.3d 764, 780.)

As to counsel's failure to exercise peremptory challenges, defendant argues only that "trial counsel left two jurors on the panel who had backgrounds which strongly suggested they could not possibly be fair and impartial in a *rape* case." This argument concedes any prejudice from failure to remove the two jurors is pure speculation.[5] "Defendant has the burden of establishing, based on the record on appeal [citations] and on the basis of facts, not speculation [citation], that trial counsel rendered ineffective assistance. [Citation.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 876-877.) Defendant has failed to make that showing as to the selection of jurors.

"Because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process." (*People v. Montiel* (1993) 5 Cal.4th 877, 911.) It is not possible, or even necessarily advantageous, to remove all jurors with relevant life experience. "'Jurors bring to their deliberations

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[5] At the hearing on the motion for a new trial, defendant conceded that failing to exercise peremptory challenges to remove the two jurors "[o]n its face, your Honor, probably doesn't rise to the level of IAC."

knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses; it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. "[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citation.]'" (*People v. Danks* (2004) 32 Cal.4th 269, 302-303.)

2. Failure to Investigate

Defendant contends counsel was ineffective in failing to adequately investigate his case. He contends trial counsel should have contacted and interviewed the numerous witnesses to the party at J.M.'s and the gathering where G.B. claimed she was attacked; in addition, counsel should have identified the person found in the bathroom with G.B. Defendant also contends counsel should have (1) located the investigator who took Draper's statement which was later lost; (2) determined if A.B.'s neighbors complained about defendant banging on her door or noticed his violence towards her; (3) located the security guard who broke up the alleged fight between Draper and A.B.; and (4) found documentary evidence that defendant and others worked on the rental property on October 4 to support defendant's alibi as to A.B.'s claim of rape. Tellingly, defendant does not indicate what the results of this further investigation would have been.

Nor does he identify any witness who should have been called at trial or any other piece of evidence favorable to defendant that could have been produced as a result of this further investigation.

Even if we found suspect counsel's failure to conduct further investigation, defendant would not prevail on his claim that counsel's omission constituted ineffective assistance of counsel. In addition to proving counsel's incompetence, a defendant must also show prejudice as a demonstrable reality--not simply a speculation about the effect of counsel's alleged errors. (*People v. Williams* (1988) 44 Cal.3d 883, 937.) It is well established that "prejudice must be affirmatively proved. [Citations.] 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.) Simply identifying further areas of potential investigation does not carry defendant's burden to establish that his counsel's inaction was error or that it resulted in prejudice.

3. Failure to Present Exculpatory Evidence

Defendant contends trial counsel was ineffective in failing to present certain exculpatory evidence. Specifically, defendant contends counsel should have presented (1) the

testimony of Ashwin Chandra to impeach J.M.; (2) evidence of sperm in J.M.'s mouth that night; and (3) evidence that a NuvaRing birth control device was found on J.M.'s bed. Defendant also contends counsel was ineffective in failing to understand the importance of evidence that amylase, found in saliva, was found on J.M.'s underwear. He contends this evidence supported his claim that he and J.M. had consensual oral sex that night.

Generally, the decision whether to present certain evidence is a tactical decision by trial counsel that is subject to deferential review. "'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."' [Citation.] '[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Testimony of Ashwin Chandra

Defendant contends trial counsel was ineffective in failing to present the testimony of Ashwin Chandra, who was present at J.M.'s home in the early hours of October 2. Chandra would testify that J.M. was flirting with defendant that night. The

record provides ample support for a reasonable tactical decision not to call Chandra as a witness.

Trial counsel told defendant's family he would not call Chandra because Chandra had "gone sideways." Chandra's version of events did change. He told an investigator he saw J.M. and defendant kissing, but he omitted this fact in his declaration submitted in support of the new trial motion. Chandra had a criminal record and was in prison at the time of the new trial motion. Trial counsel could have reasonably concluded he had credibility issues. Chandra told an investigator that none of those present that night would testify J.M. flirted with defendant because they were all having sex with her and would be concerned that she would cut them off if they displeased her. A tactical decision to stay away from this inflammatory testimony would be reasonable.

Sperm in J.M.'s Mouth

Prior to trial the prosecutor disclosed that sperm was found in J.M.'s mouth. DNA testing was performed but no profile was obtained. The court ruled this evidence was inadmissible. "We're not going to put her sexual history on trial."

Defendant contends a showing that J.M. had consensual sex that night "would have been highly relevant to whether or not, as appellant testified, sex with him was also consensual." He contends counsel should have demanded discovery as to the DNA testing.

Failure to inquire as to the DNA testing of the sperm was not ineffective assistance of counsel because defendant fails to

show evidence of the sperm could have been admitted. While defendant believes J.M.'s sexual history is relevant and probative on the issue of consent, the Legislature has concluded otherwise. Evidence of instances of the complaining witness' sexual conduct is not admissible by the defendant to prove consent. (Evid. Code, § 1103, subd. (c)(1).)

NuvaRing Evidence

The People moved to exclude evidence that a birth control device, called a NuvaRing, was found in J.M.'s bed the night of the rape and to exclude any mention of the fact that J.M. was on birth control. The trial court granted the motion. Defendant faults trial counsel for failing to argue that the issue of birth control and the device should be admitted.

In his declaration, trial counsel stated he discussed the issue of the NuvaRing device with defendant "on no fewer than ten occasions." While defendant and his mother thought this evidence was important, counsel made a tactical decision not to pursue it. His research indicated the device did not come out easily, and he believed J.M. was unaware that it had come out because she told defendant she used birth control.[6] Counsel was concerned that the jury would conclude J.M. had to be unconscious or she would have been aware the NuvaRing had been

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[6] In his brief, without citation to the record, defendant contends there was evidence he asked J.M. about birth control. In accordance with the court's ruling, there was no such testimony at trial.

removed. We will not second-guess this reasonable tactical decision.

Amylase Evidence

Forensic testing revealed that amylase, found in high concentrations in saliva, was found on J.M.'s underwear. An e-mail from a senior criminalist to the prosecutor advised him of this finding. Defendant contends trial counsel's "failure to exploit the amylase evidence is simply unfathomable."

Trial counsel did question the senior criminalist about finding amylase on the underwear. He also elicited testimony that it was indicative of saliva. So the amylase evidence was before the jury. Further, this evidence does not exonerate defendant. In denying the motion for a new trial, the court found that while this evidence would support the inference that defendant was performing oral sex on J.M. for her gratification, it also supported inferences that he performed oral sex on an unconscious J.M. for his gratification, that he used saliva to lubricate his unconscious victim, or that he was trying to wake her up. As the court found, defendant cannot show the result of the trial would have been different if counsel had "exploited" the amylase evidence to a greater degree.

II.

There Was No Abuse of Discretion in Denying an Evidentiary Hearing on the New Trial Motion

Defendant contends the court abused its discretion in failing to hold an evidentiary hearing on the motion for a new trial. He contends he was prejudiced because the court

foreclosed his ability to cross-examine trial counsel as to his failure to conduct further investigation or present witnesses to impeach J.M., G.B. and A.B.

As set forth above, the decision whether to have an evidentiary hearing as part of the motion for a new trial is within the discretion of the trial court. (*People v. Williams, supra,* 16 Cal.4th 635, 686.) Defendant has failed to show an abuse of discretion.

At the hearing on the motion for a new trial, defense counsel complained about the lack of an evidentiary hearing. He indicated that at such a hearing he would call a forensic toxicologist, a nurse practitioner, and Ashwin Chandra. On reconsideration, the court allowed the defense to submit declarations from these witnesses for the court's consideration. The defense did not tell the court it wanted to call trial counsel as a witness at an evidentiary hearing or seek permission to submit a declaration from him.

Defendant complains trial counsel's declaration, submitted by the People in opposition to motion for a new trial, does not address counsel's tactical decisions regarding investigation or calling impeachment witnesses. Defendant, however, makes no showing that he sought to obtain a declaration from trial counsel addressing these issues. Indeed, trial counsel's declaration states that he contacted defendant's new attorney "on at least three occasions and offered to speak with him, but have had virtually no response from him." Thus, any failure to resolve disputed factual issues concerning trial counsel's

representation of defendant appears to be due to the failures and inaction of his subsequent counsel, not the trial court's failure to hold an evidentiary hearing.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.